STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff/Counter-Defendant-Appellant,

v

DEBBRA POLONY and GARY F. POLONY, JR., Guardian of Debbra Gwenn Polony,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
July 22, 2008

No. 275026
Berrien Circuit Court
LC No. 2005-002974-CK

BORGESS MEDICAL CENTER,

Plaintiff-Appellee/Cross-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellant/Cross-Appellee.

No. 275100
Berrien Circuit Court
LC No. 2004-003469-NF

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff/Counter-Defendant-Appellee,

v

GARY F. POLONY, JR., Guardian of Debbra Gwenn Polony,

No. 275118
Berrien Circuit Court
LC No. 2005-002974-CK

Defendant/Counter-Plaintiff-
Appellant.

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

In these consolidated appeals, Citizens Insurance Company of America, and Gary F. Polony, Jr., as guardian of Debbra Gwenn Polony, appeal as of right from the trial court's November 27, 2006, final order, while Borgess Medical Center has filed a cross-appeal in response to Citizens' appeal.[1] Citizens also takes issue with the trial court's April 24, 2006, order, which pursuant to MCR 2.116(C)(10), granted the deceased's and Polony's motion for summary disposition, as well as Borgess' motion for summary disposition, and furthermore, ruled that Citizens' proposed expert witness James Hrycay was precluded from testifying as an expert witness. Polony takes issue with the trial court's November 27, 2006, final order to the extent that it denied his respective motions for attorney fees and penalty interest, while Borgess takes issue with the trial court's October 23, 2006, order to the extent that it denied its motion for attorney fees. We affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

I. Facts and Procedural History

On August 10, 2004, at approximately 9:15 a.m., David Daily, who was driving his stepfather's vehicle, was traveling southbound on Lakeview Avenue at approximately 25 miles per hour. Daily noticed the deceased walking toward St. Joseph High School on the sidewalk parallel to Donna Drive. Daily noted that the deceased was facing away from him. As Daily approached the intersection of Lakeview and Donna, the deceased began running across the intersection. The deceased crossed both north bound lanes before impacting the driver's side door area of the vehicle Daily was driving, despite the fact that Daily swerved to the right in an attempt to avoid a collision. Daily stated that although he did not know if the deceased "thought she was going to beat [him]," he felt that "she intentionally tried to impact the vehicle."

Denise Klann, Bill Mueller and Steve Sunday, three members of the St. Joseph High School custodial staff, all witnessed the accident. Klann testified that the deceased was walking down the sidewalk, briefly stopped at the intersection of Lakeview and Donna, and then ran across the intersection and into the side of a vehicle. Although Klann testified that the vehicle swerved onto the sidewalk in an attempt to avoid a collision, she did not see where the deceased was looking before she entered the intersection and did not know whether the deceased saw the vehicle. Mueller's and Sunday's respective recollections of the accident essentially mirrored

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[1] Throughout this opinion, Citizens Insurance Company of America will be referred to as "Citizens," Gary F. Polony, Jr., as guardian of Debbra Gwenn Polony, will be referred to as "Polony," Debbra Gwenn Polony will be referred to as "the deceased," and Borgess Medical Center will referred to as "Borgess."

Klann's recollection, except for the fact that Mueller did not see the vehicle swerve to avoid a collision. Like Klann, Sunday did not know which way the deceased was looking before she entered the intersection. Mueller, however, believed that the deceased was looking down as she entered the intersection, adding that she was possibly tired from jogging, and thus, did not see the vehicle. Both Mueller and Sunday opined that the deceased possibly could have been "trying to beat the car."

The police arrived shortly after Mueller called 911. Officer Kenneth Field interviewed the aforementioned witnesses. Officer Field noted that it was a clear day, and that the intersection did not present any visibility problems. After interviewing witnesses, checking out the accident scene, and doing some follow-up work, which included contacting the deceased's son, Polony, to inquire whether the deceased left a suicide note,[2] Officer Field concluded that there was "nothing to indicate that [the deceased] did this purposely," and that she likely ran across the road "either in an attempt to pass the roadway before the vehicle could get there or simply without seeing the vehicle that struck her." The deceased, who was unconscious from the accident, was taken to the Lakeland Hospital emergency room in St. Joseph, before later being airlifted to Borgess in Kalamazoo, and subsequently being transferred to another health care facility in Chicago, Illinois, where she remained in a coma until her eventual death on November 14, 2005. The deceased's death certificate classified her death as an accident. Polony testified that although his mother was a diagnosed schizophrenic who was easily distracted, he never knew her to be depressed or suicidal, and she had no history of prior suicide attempts.

Linda Collins, the director of financial services for Borgess, sent Citizens a bill for the deceased's time spent at their facility, but never received payment. Julia Davis, a manager at Citizens who had the final decision in denying PIP benefits, testified that Citizens denied coverage because it believed the deceased's acts fell under the policy's intentional act exclusion. Davis made her ultimate conclusion after reviewing the police officer's statements that the police had initially contemplated a possible suicide, and also reviewing various recorded statements by eyewitnesses that the deceased ran into the insured's vehicle. Davis noted that she knew the deceased suffered from schizophrenia, but she did not rely on that information in denying coverage. Davis was aware of the fact that no suicide note was found, and that a "to-do list" and grocery list were found. Davis further admitted that she did not review any depositions, nor did she review any prior medical records before making her ultimate decision to deny coverage in a November 2004 letter.[3]

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[2] Officer Field's initial intuition that there was not a suicide was confirmed when Polony responded that he did not find a suicide note, but to the contrary found a "to-do list" and grocery list, both of which were dated August 10, 2004 (i.e., the day of the accident). The "to-do list" and grocery list were never produced, as Polony threw both away.

[3] Furthermore, Citizens did not retain Hrycay until after it denied benefits, and thus at that time did not have the benefit of Hrycay's opinion about the deceased's state of mind, which might have influenced a layperson, even if it was legally and scientifically unsound.

On December 9, 2004, Borgess filed suit against Citizens for the payment of unpaid no-fault benefits, as well as attorney fees, and statutory and penalty interest (Case No. 2004-3469-NF). Citizens filed a declaratory judgment suit against Polony (Case No. 2005-2974-CK) seeking a declaration that it did not owe any no-fault benefits because the deceased intentionally tried to injure herself. On February 9, 2005, Polony filed a counter-complaint against Citizens, seeking a declaration that she was entitled to no-fault benefits. After a transfer of venue to Berrien County, the trial court entered an order consolidating the aforementioned cases.

After substantial discovery, Citizens and Borgess filed cross-motions for summary disposition, with Polony eventually filing a "concurrence in [Borgess'] motion for summary disposition." After hearing oral arguments regarding the parties' motions, the trial court found that Citizens did not have any evidence to sustain its position unless its expert Hrycay was allowed to testify regarding the deceased's subjective intent at the time of the incident in question. The trial court stated, "it's incumbent on the court to make a ruling pursuant to Daubert[4] as to whether that opinion evidence is admissible" before it can make a ruling regarding the parties' respective motions for summary disposition, and if it is found that Hrycay's testimony is inadmissible, "then Borgess is entitled to summary disposition."

On April 13, 2006, the trial court conducted a *Daubert* hearing regarding the admissibility of Hrycay's expert opinion testimony. The trial court "appreciated" the qualification of Hrycay as "an accident reconstruction expert," and thus, accepted his testimony regarding the speed of the vehicle, where the questioned impact occurred, and the fact that Daily tried to avoid the accident. However, the trial court additionally found that Hrycay was "not qualified to give subjective intent testimony as to what was going through [the deceased's] mind," noting that by Hrycay's own admission, his ultimate conclusion was based on "what a reasonable person" would have done under the circumstances. The trial court held that Hrycay was precluded from testifying regarding what the deceased's subjective intent was. Given that the only remaining relevant issue was the deceased's intent, the trial court subsequently entered an order on April 24, 2006, precluding all of Hrycay's proposed testimony, denying Citizens' motion for summary disposition, and granting Borgess' and Polony's respective motions for summary disposition pursuant to MCR 2.116(C)(10).

Borgess then filed a motion for attorney fees, taxable costs, and penalty and statutory interest. After hearing oral arguments regarding Borgess' motion, the trial court granted Borgess' motion for penalty interest, statutory interest and taxable costs, and denied Borgess' motion for attorney fees in an October 23, 2006, order. The trial court denied Borgess' motion for attorney fees based on its findings that although it made "an ultimate determination pursuant to (C)(10) that there was nothing in the record to support [an] intentional act," given that the "proper focus is on what the insurance company knew as of the date of the [initial] denial" and not on "whether coverage was ultimately determined to exist," based "on the record that Citizens

[4] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

had before it [when it denied coverage] it was [not] unreasonable [for Citizens] to deny the claim."

Polony subsequently filed a motion for attorney fees, taxable costs, and penalty and statutory interest. The trial court granted in part, and denied in part Polony's motion in a November 27, 2006, order. The trial court granted Polony's motion for penalty interest in the amount of $46,143.45, which represents 12 percent "per annum" of the $234,136.81 in unpaid medical bills. The trial court further granted Polony's motion for taxable costs, as well as Polony's motion for statutory interest. The trial court denied Polony's motion for penalty interest in regard to the portion of medical bills that were paid by Medicare and Medicaid, as well as Polony's motion for attorney fees for the same reasons that it denied Borgess' motion.

II. Analysis

A. Summary Disposition

We first address Citizens' argument that the trial court erred when it granted summary disposition in favor of Borgess and Polony. We review a trial court's decision to grant or deny a motion for summary disposition de novo, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

MCL 500.3105 provides in pertinent part:

> (1) Under personal protection insurance an insurer is liable to pay benefits for *accidental bodily injury* arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.
>
> (2) Personal protection insurance benefits are due under this chapter without regard to fault.
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> * * *
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> (4) Bodily injury *is accidental* as to a person claiming personal protection insurance benefits *unless suffered intentionally by the injured person or caused intentionally by the claimant* . . . . [(Emphasis added.)]

It follows that Citizens' policy language excluding coverage to anyone "who intentionally caused the bodily injury" would legally preclude coverage in this instance if it were found that the deceased intentionally tried to injure herself. MCL 500.3105; *Griffith ex rel Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005).

It is without dispute that "the 'insured bears the burden of proving coverage, while the insurer must prove that an exclusion to coverage is applicable.'" *Heniser v Frankenmuth Mut*

Ins, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995), quoting *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 424-425; 531 NW2d 168 (1995) (Boyle, J., concurring). To find an intentional injury, a court must conclude that the injured party intended both the act and the injury. *Allstate Ins Co v McCarn*, 466 Mich 277, 282-283; 645 NW2d 20 (2002); *Bronson Methodist Hosp v Forshee*, 198 Mich App 617, 629-630; 499 NW2d 423 (1993). The subjective intent of an actor is the focus of determining whether the actor acted intentionally. *Allstate Ins Co*, *supra* at 283; *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 226; 553 NW2d 371 (1996).[5]

Here, the deceased's death certificate classified the death in question as an accident, the deceased never left a suicide note or made a declaration that she intended to kill herself, and no evidence was presented to establish that the deceased had ever previously attempted to kill herself or had suicidal tendencies. In fact, to the contrary, Polony testified that he never knew the deceased to be depressed or suicidal, and the "to-do list" and grocery list strongly suggest

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[5] Although some believed that *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 115; 595 NW2d 832 (1999) suggested that an objective standard could be used when it stated "a determination must be made whether the consequences of the insured's intentional act 'either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions,'" as noted by the trial court, *Allstate Ins Co*, *supra*, clarified that a court must focus on the insured's subjective intent when determining whether the insured intended both the act and the injury:

> What this essentially boils down to is that, if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured.
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> As to the perspective from which the analysis should be made, the question is not whether a *reasonable person* would have expected the consequences, but whether the *insured* reasonably should have expected the consequences. Accordingly, an objective foreseeability test should not be used in the present context. Rather, the analysis must be that, to avoid coverage, the consequences of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured.
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> * * *
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> In our judgment, the language 'by the insured' modifies both 'intended' and 'expected.' Therefore, there is no coverage where the consequences of the insured's act were either 'intended by the insured' or 'reasonably should have been expected *by the insured*.' The language, 'by the insured,' indicates that a subjective standard should be used here. [*Id*. at 282-284 (emphasis in original).]

that the deceased had no plans or expectations of dying that day. Accordingly, no direct evidence was presented that would create a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself. Indeed, the direct evidence that was presented tended to establish that the deceased did not try to injure herself.

Citizens cites the case of *Schultz v Auto-Owners Ins Co*, 212 Mich App 199; 536 NW2d 784 (1995), in support of its argument that the facts and circumstances surrounding the incident (i.e., eyewitness testimony that the deceased suddenly ran into the vehicle, that the investigating officers inquired into the possibility of suicide, and that the deceased suffered from schizophrenia)[6] establish a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself. *Schultz* concerned a claim for PIP benefits where the injured person's intent was at issue. *Id*. at 200-201. The Court stated:

> Viewing the facts in a light most favorable to plaintiff, the evidence showed that [the plaintiff] quarreled with his girlfriend. He then jumped from a moving van that he was driving. Statements he made before jumping established that he did so either to elicit the girlfriend's sympathy or to arouse feelings of guilt in her. Consequently, plaintiff's intent to cause himself injury can be inferred from the facts. [*Id*. at 201-202.]

We agree with Citizens that an injured party's intent can be established from circumstantial evidence. However, unlike *Schultz*, the admitted evidence, when viewed in a light most favorable to Citizens, did not establish a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself.

As noted by Citizens, the general consensus of the eyewitness testimony was that the deceased briefly stopped at the intersection of Lakeview and Donna before jogging across the north bound lanes of Lakeview and eventually running into Daily's vehicle, despite the fact that Daily swerved onto the curb in an attempt to avoid a collision. We further acknowledge that Daily even opined that the deceased "intentionally tried to impact the vehicle," while Sunday made a conclusory statement that the deceased "purposely ran into [the vehicle.]" However, upon further questioning, all eyewitnesses admitted that they never saw where the deceased was looking, nor did they know what she was thinking when she attempted to run across the street, adding that they believed the deceased either did not see the car, or was "trying to beat the car."

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[6] Citizens' argument that Polony's actions of disposing of the deceased's August 10, 2004, "to-do" and grocery lists upon discovery of them creates an inference that the lists were adverse to Borgess and Polony, is without merit. An individual is only under a duty to preserve evidence that he or she knows or reasonably should know is relevant to an action. *Brenner v Kolk*, 226 Mich App 149, 162; 573 NW2d 65 (1997). Here, Polony advised the police of the aforementioned lists and was never asked to reproduce copies or save the lists. Furthermore, at the time that Polony disposed of the lists, there was no reason for him to believe that there would be a subsequent dispute regarding the payment of insurance benefits. It follows that Polony did not intentionally destroy documents with a fraudulent intent, and thus, Citizens' adverse inference argument fails. See *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957).

Therefore, viewed in its entirety, the eyewitness' testimony did not create a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself.

Furthermore, although Officer Field, as a part of standard procedure, contacted Polony to inquire whether the deceased left a suicide note, Polony responded that all he found was a "to-do list" and grocery list, both of which were dated August 10, 2004. This information led Officer Field to ultimately conclude that there was "nothing to indicate that [the deceased] did this purposely," and that she likely ran across the road "either in an attempt to pass the roadway before the vehicle could get there or simply without seeing the vehicle that struck her." Therefore, the investigating officer's testimony also does not create a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself.

Likewise, the mere fact that the deceased suffered from schizophrenia does not create a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself. See *Miller*, *supra* at 226 (holding that "a claim of mental illness, by itself, does not create a factual question regarding the actor's intent"). Accordingly, the admitted evidence viewed in a light most favorable to Citizens, did not establish a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself, *id*., and the trial court did not err when it granted summary disposition in favor of Borgess and Polony, MCL 500.3105; *Griffith ex rel Griffith*, *supra* at 531; *Veenstra*, *supra* at 164.

B. Expert Hrycay

We next address Citizens' argument that the trial court abused its discretion when it excluded all of Hrycay's proposed expert testimony. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion . . . .

MCL 600.2955(1) provides further guidance, stating:

> In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact.

"It is well-established that the proponent of evidence bears the burden of establishing relevance and admissibility." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004) (internal quotation marks and citation omitted). The trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes; rather, it is to preclude evidence that is unreliable. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007). The inquiry is whether an expert's opinion is rationally derived from a sound foundation. *Nelson v American Sterilizer Co (On*

Remand), 223 Mich App 485, 491-492; 566 NW2d 671 (1997). The standard focuses on the scientific validity of the expert's methods rather than on the correctness or soundness of the expert's particular proposed testimony. *Daubert, supra* at 589-590. An expert's opinion is admissible if it is based on the "methods and procedures of science," as opposed to "subjective belief or unsupported speculation." *Id.* at 590.

Hrycay was neither a psychiatrist nor a psychologist, and as noted by the trial court, Hrycay's ultimate conclusion was based on "what a reasonable person" would have done under the circumstances. In fact, by Hrycay's own admission, he was not qualified to testify regarding what the deceased's subjective intent was at the time of the questioned incident.[7] Hrycay's ultimate conclusion that the deceased "intended to run into [Daily's] vehicle" was therefore not "rationally derived from a sound foundation," nor was Hrycay "qualified as an expert by knowledge, skill, experience, training, or education" to give the conclusion. Accordingly, the trial court did not abuse its discretion when it found that Hrycay was "not qualified to give subjective intent testimony as to what was going through [the deceased's] mind." MCL 600.2955(1); MRE 702; *Nelson, supra* at 491-492.

Moreover, although the trial court properly noted that Hrycay was qualified as "an accident reconstruction expert," accident reconstruction testimony is not relevant to determine the deceased's subjective intent, and thus, would not assist the trier of fact in making its ultimate determination regarding whether the deceased intentionally tried to injure herself. *Miller, supra* at 226; *Bronson Methodist Hosp, supra* at 629-630. Only relevant evidence would be admissible. MRE 402. Therefore, the trial court did not abuse its discretion when it precluded Hrycay's proposed testimony. MCL 600.2955(1); MRE 702; *Gilbert, supra* at 781.

C. Attorney Fees

We next address Borgess' and Polony's arguments that the trial court erred when it denied their respective motions for attorney fees. We review a trial court's decision to award or deny attorney fees under MCL 500.3148 for clear error. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999). A finding is clearly erroneous when, even if there is evidence in the record to support it, this Court is left with a definite and firm conviction that a mistake has been made by the trial court. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004).

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[7] Hrycay's testimony in this regard was as follows:

> Q: . . . would I be correct that as a civil engineer and an accident reconstructionist you would never be able to testify as to what was in Mrs. Polony's mind at the time of the occurrence?
>
> A: That's a fair statement.

The no-fault act provides for an award of reasonable attorney fees to a claimant if the insurer unreasonably refuses to pay the claim. Specifically, MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994), rev'd on other grounds 459 Mich 42 (1998). Accordingly, an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay. *Id.* The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). The trial court correctly set forth this rule of law in determining that neither Borgess nor Polony was entitled to attorney fees. The issue before us is whether the trial court clearly erred in finding that Citizens' refusal was based on a legitimate question of factual uncertainty.

Borgess and Polony correctly point out that the police, the medical examiner and the trial court all ultimately concluded that the incident in question was an accident, with the trial court additionally finding that there was not even a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself. However, given that the determinative factor in our inquiry is whether the insurer's initial refusal to pay was unreasonable, *Shanafelt, supra* at 635, we must limit our focus to the information that Citizens had when it initially denied coverage.

Davis stated that after reviewing "the total facts of the situation," she ultimately denied coverage based on the fact that the police officers' statements, the eyewitnesses' recorded statements and the driver's affidavit and recorded statement created a factual uncertainty regarding whether the deceased intentionally tried to injure herself. Davis felt that the fact that the police attempted to find a suicide note and contemplated the possibility of a suicide created an inference that the deceased may have intentionally tried to injure herself. Davis further felt that the accident report and eyewitness' account of the accident that the deceased "went from walking to jogging to running . . . changed her direction abruptly . . . [and] ran into the vehicle," specifically Sunday's statement that he thought the deceased "*purposely*" ran into the car, and Daily's statement that he felt the deceased "*intentionally* tried to impact the vehicle," could only lead to a conclusion that there was at least a possibility that the deceased intentionally tried to injure herself.

Review of the record, however, reveals that at the time Citizens denied coverage in November 2004, it was fully aware that the police had, through its investigation, ruled out

suicide as a possible reason for the accident.[8] Citizens knew there was no suicide note and that, to the contrary, the deceased had prepared a "to-do list" to accomplish certain tasks that day, as well as a grocery list of items she needed to purchase. On October 22, 2004, a Citizens claims adjuster spoke directly with Officer Field of the St. Joseph City Police Department, and documented, in part, this internal note in the Citizens CSS computer claim log:

> OFFICER FIELDS [sic] ADV[ISED] THAT THERE WAS NO PHYSICAL EVIDENCE OF AN ATTEMPTED SUICIDE. THE POLICE CONTACTED DEBRA'S [sic] SON AFTER THE ACCIDENT, HE WENT TO HER HOUSE AND DID NOT FIND ANY SUICIDE NOTE OR ANY EVIDENCE THAT SHE MAY TRY AND HURT HERSELF. THE CLMT'S [CLAIMANT'S] SON FOUND A TO DO LIST ON HER TABLE FOR THE DAY OF THE ACCIDENT ALONG WITH A GROCERY LIST . . . .

Officer Field discussed with Citizens that while the theory of possible suicide was considered, there was no physical evidence to substantiate that assumption. Thus, it was illogical for Citizens to choose to rely on one of the police's initial theories of the accident and then ignore the results of the police investigation ruling out that possibility. Further, there was no indication of suicidal ideation or prior suicide attempts in the deceased's medical records, no statements attributed to her about her intentions, or any other evidence supporting a possible suicide attempt. Citizens had not even retained Hrycay as an expert at that time, and his unscientific opinion that suicide was a possible cause was the closest thing to evidence Citizens presented. The subjective "hunch" of one of Citizens' claims adjusters without any substantiating evidence, and which required a conscious disregard of evidence to the contrary, was simply insufficient to warrant denial, and Citizens did not overcome the rebuttable presumption that its initial decision to deny coverage was unreasonable.[9] There was neither a sufficient quantum nor quality of

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[8] Proclaiming possible suicide as its reason for denial appears to be Citizens' third attempt to avoid coverage in this matter. On September 20, 2004, Citizens denied Borgess' claim for payment, documenting on the denial form, "NO PIP APPLICATION." Having received a completed Application for No-Fault Benefits, Citizens continued to refuse to pay, mainly because it was not convinced that it was the carrier in highest priority for paying the medical expenses, a defense clearly rejected as unreasonable under Michigan law. *Borgess Medical Ctr v Resto*, 273 Mich App 558, 572-573; 730 NW2d 738 (2007); *Specht v Citizens Ins Co*, 234 Mich App 292, 296; 593 NW2d 670 (1999); *Cannell v Riverside Ins Co*, 147 Mich App 699, 706; 383 NW2d 89 (1985).

[9] Prior to the hearing in this matter, Citizens filed a motion to note recent legal developments, which we granted. In its motion, Citizens cited the recently released Michigan Supreme Court opinion, *Ross v Auto Club Group*, 481 Mich 1; 748 NW2d 552 (2008), in support of its contention that the trial court did not err in refusing to award Polony and Borgess attorney fees. In *Ross*, the Supreme Court indicated that an insurer acted reasonably in its denial of benefits when it relied on an existing, factually similar Court of Appeals decision to adopt a reasonable position on an issue of first impression. In this matter, Citizens' purported reliance on *Shultz*, *supra*, and *Wales v AIG Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 2, 2004 (Docket No. 241940), is not only unverified in the existing record, but such reliance—if in fact it occurred—was unreasonable because those cases contain facts that are

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evidence at the time of denial to support Citizens' theory of the accident. Consequently, we are left with a definite and firm conviction that the trial court made a mistake when it found that, at the time Citizens denied coverage, there was a legitimate question of factual uncertainty regarding whether the deceased intentionally tried to injure herself. Accordingly, the trial court committed clear error when it denied Borgess and Polony's respective motions for attorney fees. We reverse the trial court's decision to deny attorney fees to Borgess and Polony and remand this matter to the trial court to determine the attorney fees that should be awarded under MCL 500.3148(1).

D. Penalty Interest

We next address Polony's contention that the trial court erred when it denied his request for penalty interest in regard to the portion of medical bills that were paid by Medicare and Medicaid. We review a trial court's award or denial of penalty interest under MCL 500.3142 for clear error. *Borgess Medical Ctr, supra* at 576. Furthermore, the interpretation and application of statutes are questions of law that we review de novo on appeal. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000).

With respect to penalty interest, MCL 500.3142 provides in relevant part:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. . . .
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum.

Before penalty interest may be awarded to a claimant, PIP benefits must be overdue. First, to be overdue, allowable expenses must actually have been incurred. MCL 500.3142(1); *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003). Second, PIP "benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount *of loss sustained*." MCL 500.3142(2) (emphasis added). The trial court must assess penalty interest against a no-fault insurer if the insurer refuses to pay benefits after receiving reasonable *proof of loss* and it is later determined to be liable, notwithstanding the insurer's good faith in not promptly paying the benefits. *Davis v Citizens Ins Co of America*, 195 Mich App 323, 328; 489 NW2d 214 (1992).

Here, the trial court granted Polony's motion for penalty interest in the amount of $46,143.45, which represents 12 percent "per annum" of the $234,136.81 in unpaid medical bills, but denied Polony's motion for penalty interest in regard to the portion of medical bills that were paid by Medicare and Medicaid. Given the clear statutory language that penalty interest

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(…continued)

significantly dissimilar to the facts in the present case. In each of the cases cited by Citizens, the injured victim made explicit comments regarding his intentions after quarreling with a significant other before jumping out of a moving vehicle. Thus, Citizens' argument lacks merit.

begins to accrue once "an insurer receives reasonable proof of the fact and of the amount of loss sustained," and that Polony did not sustain any loss for medical bills that were paid by Medicare and Medicaid, it follows that the trial court did not commit clear error when it denied Polony's motion for penalty interest in part, denying the requested penalty interest in regard to the portion of the bills that were paid by Medicare and Medicaid. MCL 500.3142(2); *Davis, supra* at 328. If the Legislature's intent is clearly expressed, no further construction is permitted, and thus, "a court is prohibited from imposing a contrary judicial gloss on the statute." *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490; 672 NW2d 849 (2003) (internal quotation marks and citation omitted).

E. Medicaid Lien

The final issue we address is Polony's request "that this Court amend the trial court order to reflect the increased amount of the claimed Medicaid lien." Despite the fact that Polony was at the very least aware of an alleged increase in the Medicaid of Illinois lien from $7,481.51 to $48,002.23 on November 2, 2006, which was 25 days before the trial court entered its final order on November 27, 2006, Polony never raised the alleged lien increase before the trial court, nor asked the trial court to amend its final order. Polony's one sentence request that we amend the trial court order does not properly preserve this issue for appeal. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Furthermore, a party may not merely announce a position and leave it to this Court to discover and rationalize a basis for the claim. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). This Court may overlook preservation requirements, however, where a failure to consider the issue would result in manifest injustice. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Given the substantial increase in the alleged Medicaid lien amount, we feel this issue merits further review in order to avoid potential manifest injustice. We therefore remand this matter to the trial court to determine the amount Polony is obligated to reimburse Medicaid of Illinois, and to adjust the amount, if necessary, that Citizens is ordered to pay Polony in order to satisfy this obligation.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Jane M. Beckering